No. 09A1163

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,

Plaintiffs-Appellees,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona, and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LOUIS HOFFMAN and LORI DANIELS, in their official capacity as members of the ARIZONA CLEAN ELECTIONS COMMISSION,

Defendants-Appellants,

and

CLEAN ELECTIONS INSTITUTE, INC.,

Defendant Intervenor-Appellant,

On Joint Second Renewed Emergency Application to Vacate Appellate Stay Entered by the United States Court of Appeals for the Ninth Circuit

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DEFENDANT-INTERVENOR-APPELLANT'S RESPONSE TO PLAINTIFFS/PLAINTIFF-INTERVENORS' JOINT SECOND RENEWED EMERGENCY APPLICATION TO VACATE APPELLATE STAY AND TO STAY MANDATE BEFORE THE HON. JUSTICE ANTHONY M. KENNEDY

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TABLE OF AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

Clean Elections Institute, Inc. has no parent corporations and no publicly held company owns more than 10% of its stock.

Less than two months before voting begins in the 2010 primary elections, Plaintiffs once again ask this Court to upend the decade-old rules for financing of Arizona elections by enjoining matching funds for publicly-funded candidates. The procedural defects in Plaintiffs' application remain—most notably, their failure to first seek relief in the Court of Appeal[1] or to explain why a stay is necessary for this Court to maintain jurisdiction if it eventually grants certiorari. Defendant-Intervenor Clean Elections Institute, Inc. ("CEI") will not repeat its arguments with respect to those defects here but respectfully incorporates by reference its Response to Plaintiffs' Renewed Application To Vacate Appellate Stay And Stay The Mandate (May 27, 2010). (Def. App. 35-69.)[2]

CEI limits its response here to addressing two very serious substantive concerns with the injunction Plaintiffs seek: (1) such an injunction would directly reduce political speech and thereby deprive Arizona voters of the ability to make informed choices; and (2) it would likely distort the outcome of the 2010 elections in

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[1] On June 4, 2010, Plaintiffs informed the Court that they intended to file a motion to stay the mandate with the Court of Appeals. *See* Email from N. Dranias to D. Bickell (June 4, 2010) ("today we intend to file a motion to stay the mandate with the Ninth Circuit Court of Appeals"). After Plaintiffs were informed that this might lead the Court to defer ruling on the instant application, Plaintiffs wrote to the Court that in fact they would not be filing such a motion with the Court of Appeals. *See* Email from D. Bickell to N. Dranias (June 4, 2010) ("Justice Kennedy or the Court may wait until the Ninth Circuit rules on your motion before issuing an order on the pending application to vacate"); Response email from N. Dranias to D. Bickell (June 4, 2010) ("We will not be filing a motion to stay the mandate with the Ninth Circuit today."). Thus, contrary to Rule 23.3, Plaintiffs still have not asked the Court of Appeal to stay the mandate. *See* Supreme Court Rule 23.3 ("[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court . . . below").

[2] References to "Def. App." are to Defendants' And Defendant-Intervenors' Joint Appendix To Their Responses To Plaintiffs/Plaintiff-Intervenors' Joint Second Renewed Emergency Application To Vacate Appellate Stay And To Stay Mandate Before The Hon. Justice Anthony M. Kennedy. References to "App." are to the Appendix attached to Plaintiffs/Plaintiff-Intervenors' Joint Second Renewed Emergency Application To Vacate Erroneous Appellate Stay And Ancillary Application To Stay Mandate Before The Hon. Justice Anthony M. Kennedy.

Arizona.

Federal courts have understandably expressed extreme reluctance to enjoin state election laws in the midst of an ongoing election. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief"). They have recognized "the special dangers of excessive judicial interference with the electoral process," *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1182-83 (9th Cir. 1988), and that "[i]nterference with impending elections is extraordinary." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003).

The injunction Plaintiffs seek here would dramatically interfere with Arizona's 2010 elections. Voters would receive less information from the dozens of candidates for statewide and state legislative office in Arizona who have forgone private fundraising in exchange for public funds,[3] but who could receive only one-third of the public funding that would potentially have been available to them under the status quo. Because candidates normally are eligible to receive up to two times the base funding in matching funds, the requested injunction would eliminate 66% of the available public funding, thereby reducing candidate spending, restricting the ability of publicly-funded candidates to communicate with the electorate, depriving voters of the ability to make informed choices, and potentially

[3] As of June 4, 2010, 133 candidates have filed their declarations of intent to run as publicly-funded candidates and 39 candidates have received public funding. (Def. App. 73-74.)

distorting the results of the 2010 elections.

Dr. Ruth Jones, a Professor of Political Science at Arizona State University who has analyzed campaign financing for the last 30 years, explains in her declaration why the contemplated injunction could distort the results of Arizona's 2010 elections. (Def. App. 75-80.) As Dr. Jones details, if this Court were to cut off matching funds, most publicly-funded candidates would not be able, either legally or practically, to exit the public funding system. (*Id.* at 78-79.) Left with no other choice, publicly-funded candidates would—in the absence of matching funds—have to rely on the base level of public funding to finance their campaigns. The elimination of matching funds thus would substantially decrease spending by publicly-funded candidates and, in Dr. Jones's view, "significantly reduce a candidate's campaign activities and his or her ability to communicate with voters." (*Id.* at 79.) Of course, such an injunction would deprive voters of information about only publicly-funded candidates; privately-funded candidates would remain free to raise and spend unlimited sums. This disparity likely would alter the outcome of Arizona's elections. As Dr. Jones notes, "campaign spending is one key factor in determining the outcome of an election." (*Id.*) Thus, Dr. Jones concludes, "there is a substantial likelihood that an injunction against matching funds would, by restricting the resources available to some candidates at the eleventh hour, both deprive Arizona voters of information and therefore of the opportunity to make informed choices and change the results of at least some 2010 Arizona statewide or state legislative races." (*Id.* at 79-80.)

One race where the speech-inhibiting consequences of a matching-funds injunction could make the difference is Legislative District 10, possibly the most competitive district in Arizona. Republican State Senator Linda Gray intends to run for reelection with public funding. (Def. App. 85.) Her Democratic opponent, Justin Johnson (the son of a former Phoenix mayor), is a serious challenger who chose private financing and who had already raised $31,432, substantially more than Senator Gray's base funding amount of $21,479, as of six months ago. (*Id.* at 72, 85.) Under the status quo, voters will receive additional information about Senator Gray's candidacy due to her eligibility for matching funds. If matching funds are enjoined, however, Senator Gray's available public funding and spending will necessarily fall, limiting her ability to communicate with voters. Senator Gray reasonably fears that the elimination of matching funds would, in her words, "harm my ability to communicate with voters and will directly impact the outcome of my race." (*Id.* at 86.)

An injunction against matching funds could also deprive voters of information about key statewide races. For example, in the hotly-contested Governor's race, incumbent Republican Governor Jan Brewer, a publicly-funded candidate, is currently eligible to receive up to $2,122,341 to communicate with voters during the primary election. (Def. App. 72.) If matching funds are enjoined, that amount will drop by 66% to $707,447. (*Id.*) Her traditionally-funded opponent in the Republican gubernatorial primary, Buz Mills, has reported spending $2,295,797 already. (*Id.* at 74.) Thus, under the system that has been in place for

the last decade, Governor Brewer would receive the full amount of public funding to share her message with voters. (*Id.*) (Notably, because Mills has already spent more than the maximum possible match, he cannot claim that his spending would be chilled by the threat of triggering more matching funds in the primary election). But, if matching funds are enjoined, the 2010 Republican gubernatorial primary will become a lopsided, distorted race in which the publicly-funded candidate will be unable to communicate effectively with voters, while the privately-funded candidate will remain untrammeled in spending at least triple the resources of the publicly-funded candidate.

These are just two examples of races where enjoining matching funds would restrict campaign speech, deprive voters of critical information, and interfere with the election process and possibly the results. The declarations included in the appendix specifically identify six more races where the absence of matching funds would hamper candidates' ability to communicate with voters and distort the election. (Def. App. 81-83, 89-106.)

What justification have Plaintiffs offered for the undeniable harm their injunction would work? Nothing more than their argument on the merits—*i.e.*, that matching funds supposedly chill their speech. As a factual matter, however, neither the district court nor any member of the Court of Appeals panel found persuasive evidence of this supposed deterrent effect in the record, and for good reason—a rational candidate who believes his message is more persuasive than his opponent's message will not hesitate to spend money due to the possibility of triggering

matching funds. (App. 16, 399-402, 409-11.) For candidates who believe in their message, more speech is better, even if the other side may speak in response. For voters, matching funds only increase their opportunities to learn about the positions of the candidates whom they will consider at the ballot box.

Plaintiffs' attempt to justify interference with the Arizona electoral process on First Amendment grounds ignores the fact that their requested injunction would itself undeniably reduce the speech of publicly-funded candidates in Arizona and the information available to voters. In contrast to Plaintiffs' speculative and historically-disproven claim that matching funds will chill speech in the upcoming election, this harm to First Amendment speech freedoms would inevitably result from enjoining matching funds. It is undeniable, for example, that the requested injunction would substantially reduce the information voters receive in the gubernatorial race and in Legislative District 10.

For these reasons, Plaintiffs' latest procedurally-defective attempt to have this Court alter the status quo in Arizona shortly before the 2010 election, to the detriment of Arizona voters and Arizona's electoral process, should be rejected.

Respectfully Submitted,

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